1/19/01

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

ejs

Opposition No. 108924

Sentry Chemical Company

v.

Central Mfg. Co.

Before Seeherman, Quinn and Holtzman, Administrative Trademark Judges.[1]

By the Board:

On April 5, 2000 applicant filed an amended motion for reconsideration of the Board's March 8, 2000 decision granting opposer's motion for summary judgment, denying applicant's motion for summary judgment, and sustaining the opposition.[2] Applicant asserts that the Board erred in its consideration of the duPont factor of "the length of time during and conditions under which there has been concurrent

[1] Administrative Trademark Judge McLeod, who participated in the decision on the parties' cross-motions for summary judgment, has since left government service. Accordingly, Administrative Trademark Judge Quinn has been substituted for her in this decision.

[2] Applicant stated that its amended motion merely corrects some typographical errors in the motion for reconsideration filed on April 4, 2000. As part of the motion, applicant moved to disqualify certain judges from considering the motion for reconsideration. That motion for disqualification was decided prior to the motion for reconsideration, hence the delay in issuing the present decision.

use without evidence of actual confusion." **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In particular, applicant points to the statement made in the Board's March 8, 2000 decision, in connection with applicant's argument regarding the lack of evidence of actual confusion, that

> the absence of actual confusion is not sufficient to raise a genuine issue. Applicant has not submitted any evidence as to the extent of its use or advertising of its mark such that it would raise a question as to whether there has been an opportunity for confusion to occur.
> p. 7-8.

Applicant asserts that this statement is contrary to the stipulated facts submitted in support of the parties' motions for summary judgment, and specifically the fact that "both parties are engaged in the sale and promotion of their respective goods through the same channels of trade, and to the same general class of purchasers."

Although we have carefully considered applicant's motion for reconsideration, as well as the papers filed in connection with both opposer's and applicant's motions for summary judgment, we are not persuaded that there was any error in the Board's March 8, 2000 decision in favor of opposer. The stipulated fact that the parties sell and promote their goods through the same channels of trade to the same classes of customers does not provide any

information as to the extent of sales or promotion, or even as to whether the parties' goods are sold in the same geographic area. It simply means that the parties' goods are sold in the same type of stores, etc.; are promoted through the same type of media, etc.; and are purchased by the same kinds of customers, which would include the general public.

Thus, applicant's assertion that the parties have coexisted for 13 years without any evidence of actual confusion and the stipulated fact that the parties' goods are promoted and sold in the same channels of trade, do not show, nor would it be reasonable to infer, that there has been substantial use and advertising in the same geographic areas. Accordingly, we cannot assume from the lack of evidence of actual confusion that there has been a meaningful opportunity for confusion to occur if such were likely. As applicant itself has recognized in its cross-motion for summary judgment, "the absence of actual confusion would be meaningful only if the record indicated appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks." **Gillette Canada Inc. v. Ranir Corp.**, 23 USPQ2d 1768, 1774 (TTAB 1992), emphasis added. The stipulated use by the parties in the same trade channels does not constitute use in the same markets; as

indicated above, the stipulated fact does not provide any information as to the extent of sales or promotion, or that the goods are sold in the same geographic area. And applicant's asserted 13 years of use does not reflect how substantial the use is, since applicant has provided no information about the amount of its sales.

As the Board said in its March 8, 2000 decision, evidence of actual confusion is not necessary to prove likelihood of confusion.[3] **Gillette Canada Inc. v. Ranir Corp.**, supra. The courts and this Board have long

[3] It should be noted that the record is silent with respect to actual confusion. Opposer stated in its motion that "the parties mutually agree and request that the Board decide the proceeding by means of cross motions for summary judgment on the basis of the application file, the pleadings and the stipulated facts." p. 2. The stipulation indicated only that the parties owned certain registrations, that they used the marks on certain products, that their goods are sold through all channels of trade, and that both parties sell and promote their goods through the same channels of trade to the same class of consumers. No reference whatsoever was made with respect to actual confusion. Applicant, in its cross-motion, asserted that the parties had coexisted for 13 years, and that opposer, in its motion, had not pointed to any instances of actual confusion. Opposer thereupon stated, in its reply brief, that the parties had agreed to the stipulated facts in lieu of conducting discovery and presenting testimony. Opposer further asserted that "applicant requested the stipulation and summary judgment procedure, and may not now assume facts not in evidence." p. 2. Although applicant clearly did have the right to bring in evidence either in opposition to opposer's motion for summary judgment or in support of its own cross-motion (and the Board considered such evidence in its March 8, 2000 decision), it appears from the history of the motion that opposer was under the impression that it could not submit evidence with respect to the factor of actual confusion, or evidence to rebut applicant's assertions of 13 years of co-existence. Thus, in the context of this proceeding, applicant's statement in its opposing brief that "The Opposer is its motion for summary judgment brief can not point to even one instance of actual confusion, over a 13 year period…," p. 5, is somewhat overstated.

recognized that evidence of actual confusion is notoriously difficult to obtain. **Weiss Associates Inc. v. HRL Associates Inc.**, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); **Helene Curtis Industries Inc. v. Suave Shoe Corp.**, 13 USPQ2d 1618 (TTAB 1989); **Henry I. Siegel Co. v. M&R International Mfg. Inc.**, 4 USPQ2d 1154 (TTAB 1987). Moreover, in this case, those of the parties' goods which are identical and those which are closely related (e.g., all purpose cleaners, furniture polish, floor polish) are, by their very nature, inexpensive products. Even if consumers of such products were confused, they would be less likely to complain of or report such confusion.

Each of the evidentiary factors set out in duPont, supra, may, from case to case, play a dominant role. See **Kellogg Company v. Pack'em Enterprises, Inc.**, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In this case, the factor of the lack of evidence of actual confusion is outweighed by the other duPont factors favoring opposer, particularly the similarity of the marks and the fact that the goods are, in part, legally identical and, in part, closely related.

Decision: The request for reconsideration is denied, and our March 8, 2000 decision sustaining the opposition stands.